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FILED
JUN 15 1981
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NO. 80-2120

IN THE

Supreme Court of the United States

October Term, 1980

JOHNNY WITT

and

SARAH B. BOWMAN,
Petitioners

v.

CALVIN HARBOUR, SHERIFF OF PATRICK COUNTY, VIRGINIA, and CALVIN HARBOUR, INDIVIDUALLY,

LARRY E. BALILES, DEPUTY SHERIFF OF PATRICK COUNTY, VIRGINIA, and LARRY E. BALILES, INDIVIDUALLY,

MARTHA SUE FAIN, AGENT AND EMPLOYEE OF SHERIFF'S DEPARTMENT OF PATRICK COUNTY, VIRGINIA, and MARTHA SUE FAIN, INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Complaints (as amended), brought pursuant to 42 U.S.C. §1983, allege that reckless, malicious conduct, by persons acting under color of state law, caused indictments and arrests without probable cause. The complaints were dismissed on the pleadings as not stating a cause of action against any of the individual Defendants or the Defendant County, simply because the Plaintiffs had been indicted, even though the indictments were obtained recklessly and by perjured testimony. The questions thus presented are:

(1) Whether a State Grand Jury indictment conclusively establishes probable cause for an arrest warrant, so as to insulate and shield the Defendant perpetrators from otherwise clear §1983 liability, even though the

Defendants themselves procured the indictments recklessly, maliciously, and on admittedly perjured testimony.

(2) Whether a Complaint alleging the aforesaid reckless conduct as an "official policy" and/or "custom" of the County states a cause of action against the political subdivision.

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OPINIONS BELOW

The opinion of the District Court for the Western District of Virginia is unreported and unpublished and appears as Appendix B, infra, pp. 49. The opinions of the United States Court of Appeals for the Fourth Circuit affirming the District Court and denying a rehearing are unreported and unpublished and appear as Appendices C and D, infra, pp. 62 and 66, respectively.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered February 17, 1981. The order denying a rehearing was entered March 17, 1981. This Petition was filed within ninety (90) days of March 17, 1981.

Jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following amendments to the United States Constitution provide in pertinent part:

AMENDMENT IV: The right of the people to be secure in their persons. . . against unreasonable . . . seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the . . . persons. . . to be seized.

AMENDMENT XIV: . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

AMENDMENT V: No person shall be. . . deprived of life, liberty, or property,

without due process of law. . . .

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person, within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for relief.

STATEMENT OF THE CASE

Plaintiffs, Witt and Bowman, originally instituted separate §1983 actions each requesting a separate trial by jury. Because of similarity of fact and identity of issues, the cases were

consolidated for hearing in the Court of Appeals.

Both Complaints, alleging arrest without probable cause, were dismissed on the pleadings by the District Court, which action was affirmed by the Fourth Circuit Court of Appeals.

In so doing, the Courts below have held that in determining "probable cause" in a §1983 action, it is not permissible to challenge the motives and actions of the state officers in procuring a wholly unfounded indictment, nor is it even permissible to challenge the truthfulness of factual statements made to the grand jury whose indictments were the sole basis of the arrest warrants.

The §1983 Complaints (as amended), brought in the first instance under 28 U.S.C. 1331(a) and §1343, set forth the anticipated proof in considerable detail.

To summarize as in the Trial Court's Memorandum Opinion and the Fourth Circuit Opinion is an injustice to the Plaintiffs' case. It is fundamental that, for the purpose of a motion on the pleadings, all facts alleged, and all reasonable inferences therefrom, must be viewed in the light most favorable to the Plaintiffs and accepted as true.

In Owens v. Haas, 601 F2d 1242 (2nd Cir. 1979), cert. denied sub nom, 100 S. Ct. 483 (1980) it was affirmed that:

> "[a]n action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of the facts which could be proved in support of their claims." P. 1247. (Emphasis added).

At the risk of oversimplification, the Complaints allege that Defendant Fain, an undercover agent, acting under color of state law, maliciously perjured

herself before the grand jury causing the indictment and arrest of the Plaintiffs. In this, she testified that she had purchased contraband from each of the Defendants, when in truth and fact she had not even talked with the Defendants. Defendant Fain later plead guilty to perjury.

Fain's supervisors, Defendants Harbour and Baliles, acted callously and recklessly in that they actually knew Defendant Fain was incompetent and wholly unreliable, and nevertheless authorized her to make unsupervised "buys" of contraband.

Defendants recklessly sought and procured indictments based on Fain's known unreliable, uncorroborated testimony, despite specific warnings not to do so.

Plaintiffs were totally innocent of any crime whatsoever. They were not even

bona fide suspects, but they were nevertheless arrested on warrants issued solely by reason of the ill-gotten indictments.

The Amended Complaints further alleged that this reckless course of conduct was the "policy" and "custom" of the County so as to make the political subdivision liable therefor.

Because the Courts below held, with respect to the first question presented, that the Defendants were insulated from liability in that the indictments conclusively established probable cause, consideration of the second question presented was not necessary to the opinions below. However, if this Honorable Court deems it appropriate to review the first question, guidance is respectfully sought with respect to the second question pertaining to the County's liability.

ARGUMENT FOR ALLOWANCE OF A WRIT

1. THE DECISION OF THE FOURTH CIRCUIT IN THE CASES UNDER CONSIDERATION IS IN DIRECT CONFLICT WITH DECISIONS OF THE SEVENTH AND FIFTH CIRCUITS ON THE SAME SUBJECT MATTER:

The Courts below have held that since the Plaintiffs were "indicted", even though such indictments were procured by perjury, and through reckless, callous disregard, the ill-gotten indictments themselves preclude the §1983 actions.

The pivotal issue is then whether officers acting maliciously, or with callous, wanton recklessness, under color of state law, can insulate themselves (and the County) from liability that would otherwise clearly attach, simply by their own irresponsible and perjured procurement of the Grand Jury's stamp of approval.

The same argument made by the Defendants herein was advanced and

summarily rejected in Attreau v. Morris, 357 F2d 871 (7th Cir. 1966), a §1983 case, where the Court stated:

> "Contrary to Defendants' argument, we hold that the fact th.t the Plaintiff was indicted does not preclude this suit. . . . [citing the fact that Defendants cited no federal authority for their contention and the fact that under state law an indictment is not an absolute bar to a malicious prosecution action, the Court went on to say] we hold as federal law that the indictment of Plaintiff did not preclude this action." Pp. 874, 875. (Brackets added for context and emphasis added).

It would seem obvious that the loose, ex parte, much maligned, often abused grand jury system should not be the final arbiter of constitutional rights. The Defendant Fain knew she was not telling the truth, the Grand Jury had no such knowledge. The Defendants Harbour and Baliles themselves knew that the Defendant witness Fain was unreliable, the Grand Jury did not know this. The Defendants Harbour

and Baliles themselves had been warned not to believe the Defendant witness Fain, the Grand Jury had no such warning. The Defendants Harbour and Baliles themselves knew the Defendant Fain had lied on official police matters, the Grand Jury was not privy to this information.

Based on the limited submission which the Defendants Harbour and Baliles chose to give the Grand Jury, it was predictable to an absolute certainty that the Plaintiffs would be indicted and consequently would be arrested and lose their liberty. The entire debacle from the beginning to the end was caused by callous disregard characterized by an irresponsible and unwarranted course of conduct made possible only by those acting under color of state law.

The Courts below have concluded as a blanket, no exceptions proposition that a grand jury indictment, however

obtained, is probable cause as a matter of law, thus avoiding otherwise obvious infringements on constitutional guaranties.

Until the decision now under consideration was rendered, no Court has ever held, nor even intimated, that an indictment, procured by deliberate or reckless falsification, would constitute probable cause as a matter of law, thus shielding the perpetrating wrongdoers from civil liability.

Rodriguez v. Ritchey, 556 F2d 1185 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047, is the sole case relied on by the Defendants for this rather anomalous proposition.

However, the Rodriguez decision is based on an entirely different, easily distinguishable factual predicate. In Rodriguez, the complaint merely alleged simple negligence leading to

indictment and false arrest, whereas the instant cases allege malicious, reckless, callous disregard leading to indictment and false arrest.

Under circumstances limited to allegations of mere negligence, the Fifth Circuit held that judicial inquiry in a §1983 action could not go behind the indictment on the issue of probable cause for arrest.

Significantly, Rodriguez was a 7-6 en banc decision, even where simple negligence was in issue. Even more significantly, Judge Hill, one of the seven-member majority, wrote a separate concurring opinion stating:

> ". . . I do not wish to stamp my imprimatur [on the analysis] that indictment by a properly constituted grand jury immunizes all precedent conduct of investigative and prosecutorial authorities. . . . [S]hould an officer maliciously or in bad faith seek to obtain an indictment from a grand jury, I am not now prepared to state

> that he should be allowed to escape responsibility by showing that he did such a good job that the grand jury indicted. Rodriguez supra, pp. 1194, 1195. (Emphasis and brackets added).

By any definition, actual malice can be proven against the Defendant Fain in giving perjured testimony against Plaintiff Bowman because of a personal grudge, and for lying under oath against Plaintiff Witt simply to satisfy her superiors.

It is conceded that the Plaintiffs cannot prove, nor have they alleged, actual prior knowledge on the part of Defendants Harbour and Baliles that Defendant Fain was in fact lying on these particular occasions.

Although this concession may eliminate mala in se as to Defendants Harbour and Baliles, in light of their positions of authority, the callous, irresponsible conduct of these officers

is even more insidious than that of the Defendant Fain. It was their duty to hire reliable agents, to follow accepted procedures, to heed the many warnings and to properly train and supervise their subordinates. McClelland v. Facteau, 610 F2d 693 (10th Cir. 1979), Sims v. Adams, 537 F2d 829 (5th Cir. 1979). Their failure to do so is a classic example of deliberate indifference for the foreseeable consequences, including the loss of liberty by innocent citizens.

2. IN SUMMARILY DISMISSING THE COMPLAINTS, THE COURTS BELOW HAVE REFUSED TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE SUPREME COURT:

It is fundamental that there can be no probable cause unless the information is reliable and the informant credible. Aguilar v. Texas, 378 U.S. 108 (1964). In the instant cases we have neither.

In Pritchard v. Perry, 508 F2d 423 (4th Cir. 1975), the Fourth Circuit

correctly acknowledged that when one is arrested without probable cause his loss of liberty is redressable under §1983. But in the instant cases, the Fourth Circuit says the Plaintiffs should be left to their remedies under state law. In thus avoiding the issue the Courts below overlook that §1983 rights are independent of and supplementary to any cause of action that the Plaintiff may have had under State law. See, e.g., Steffel v. Thompson, 415 U.S. 452 (1974); Wilwording v. Swenson, 404 U.S. 249 (1971).

In affirming the Trial Court's summary dismissal, the only case cited in the Fourth Circuit opinion is Baker v. McCollan, 443 U.S. 137 (1979), a case which has absolutely no bearing on the issue at hand. Baker stands for the admittedly correct proposition that there can be no cause of action under §1983 based on mere detention, after arrest,

if there was in truth and fact probable cause for the arrest. In the instant case, it is alleged that there was no probable cause for arrest, the only "probable cause" being a deliberate lie told by a state agent inducing a grand jury to indict and thereby predictably causing the arrest of innocent citizens.

The constitutional issue thus presented is whether state agents can maliciously and/or recklessly cause the arrest of innocent citizens, and simultaneously insulate themselves from §1983 liability simply by reason of the existence of indictments, which indictments were procured solely on the basis of the Defendants' own wrongdoing.

The Courts below have simply refused to address the foregoing all important, pivotal issue, which should now be decided by this Honorable Court.

It is respectfully submitted that the abuse of power alleged is the precise type of conduct which the Civil Rights Act specifically intended to proscribe.

3. ALTHOUGH THE PRECISE ISSUE IS ONE OF FIRST IMPRESSION FOR THIS HONORABLE COURT, THE DECISION BELOW CONFLICTS WITH SIMILAR, APPLICABLE PROBABLE CAUSE PRINCIPLES PREVIOUSLY DECIDED BY THE SUPREME COURT:

Although the Supreme Court of the United States has not addressed the issue directly as it pertains to a civil rights action, in Franks v. Delaware, 438 U.S. 154 (1978) a similar principle was essentially decided directly contrary to the Fourth Circuit's per curiam decision.

The issue in Franks was whether an ill-gotten affidavit, which included falsification, conclusively established probable cause for a search warrant. Here, the issue is whether a similarly ill-gotten indictment conclusively establishes probable cause for an arrest warrant.

The Supreme Court of Delaware had held that under no circumstances could a criminal defendant challenge the veracity of a sworn statement used by police to procure a search warrant. This Honorable Court reversed, noting at the onset that the case presented an "important and longstanding issue of Fourth Amendment law". This Court held that the issue of probable cause is subject to challenge, despite an affidavit valid on its face, if there are allegations of "deliberate falsehood" or of "reckless disregard for the truth".

In Franks, this Court essentially held that the good faith and veracity of law enforcement officials is so necessary that it may in fact transcend the importance of convicting the guilty. It is respectfully submitted that such good faith and veracity is equally important in protecting the civil rights of innocent

citizens who have been arrested by malicious and/or reckless actions of those acting under color of state law.

Said this Court in Franks:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause', the obvious assumption is that there will be a truthful showing."
>
> . . . .
>
> ". . . it would be an unthinkable imposition upon [the authority of the independent third party, in this case a magistrate] if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment." Pp. 161, 162. (Brackets added for context).

Except in exigent circumstances, prior to search or an arrest, the Fourth Amendment requires a good faith submission to an independent third party for the determination of "probable cause".

It is constitutionally immaterial whether the third party is a magistrate

and the issue is probable cause in an affidavit for a search warrant; or, whether the third party is a grand jury and the issue is probable cause in an indictment for an arrest warrant. Both are ex parte proceedings and in the words of Justice Blackmun, "surely [the warrant clause] takes the affiant's good faith as its premise". Franks, p. 161.

In Franks, this Court disapproved "deliberate falsehood" and/or allegations of "reckless disregard for the truth," on the issue of determining probable cause, even though the independent third party magistrate supposedly provided a vanguard of protection for the citizenry.

In the case under consideration, we have both allegations of "perjury" and "reckless disregard" in a similar probable cause context.

4. THE CIRCUITS ARE IN MATERIAL CONFLICT AS TO THE SCOPE OF A POLITICAL SUBDIVISION'S §1983 LIABILITY UNDER MONELL AND ITS PROGENY:

All of the above-mentioned constitutional infringements are alleged to be attributable to an "official policy" and "custom", a continued pattern of misfeasance by the County's Sheriff's Department. It is alleged that the County systematically declined trained assistance and repeatedly retained incompetents to spearhead important undercover operations.

As the Second Circuit has interpreted Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), such allegations clearly state a cause of action against the County. See Owens v. Haas, 601 F2d 1242, (2nd Cir. 1979), cert. denied sub nom, 100 S.Ct. 483 (1980); Turpin v. Mailet, 48 U.S.L.W. 2714 (2nd Cir. 1980). Compare, however,

Popow v. City of Margate, 476 F.Supp. 1237 (D.N.J. 1979); Edmonds v. Dillon, 485 F.Supp. 722 (N.D. Ohio 1980); and Smith v. Ambrogio, 456 F.Supp. 1130 (D. Conn. 1978).

CONCLUSION

Considering the liberal construction required of the Civil Rights Act, the aforesaid allegations clearly set forth triable causes of action for violation of rights under the Fourth Amendment and under the "fundamental fairness" embodied by the due process clause of the Fifth Amendment. For the above reasons, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted.

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BY:
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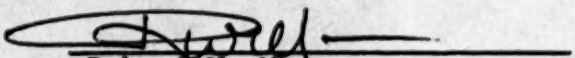
CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I am admitted to practice* before the Supreme Court of the United States and that I have this 15 day of June, 1981, filed the required copies of Petitioner's petition for Writ of Certiorari in the Clerk's Office in Washington, D.C., and have mailed the required copies of said petition for Writ of Certiorari to Mr. Thomas T. Lawson, of WOODS, ROGERS, MUSE, WALKER & THORNTON, 105 Franklin Road, S.W., Roanoke, VA 24004 and to Mr. Anthony P. Giorno, Assistant Commonwealth's Attorney for Patrick County, Stuart, VA 24171.



Robert W. Mann
Attorney for Petitioner

* to be admitted June 22, 1981

THE APPENDIX

APPENDIX A:

Complaints and Amended Complaint.

APPENDIX B:

Final Orders and Memorandum Opinion in the United States District Court for the Western District of Virginia.

APPENDIX C:

Unpublished Opinion of the United States Fourth Circuit Court of Appeals, February 17, 1981.

APPENDIX D:

Order of the United States Fourth Circuit Court of Appeals denying petition for rehearing and suggestion for rehearing en banc, March 17, 1981.

APPENDIX A. THE COMPLAINTS

(EXPLANATORY NOTE: Separate Complaints were originally filed by the Plaintiffs Witt and Bowman, and separate jury trials requested. Amended Complaints adding the County of Patrick as a party defendant were thereafter filed. Because of virtual identity of issues, the cases were consolidated in the District Court and in the United States Court of Appeals for the Fourth Circuit. The first seven paragraphs of the two original Complaints and the Amended Complaints are identical and, therefore, only the first seven paragraphs of Witt's Complaint and Witt's Amended Complaint are hereafter reproduced. Although the remaining paragraphs of the two original Complaints are substantially the same, the concluding paragraphs of both Complaints have been reproduced because of the differences in wording.)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Danville Division

JOHNNY WITT, Plaintiff, v. CALVIN HARBOUR, SHERIFF OF PATRICK COUNTY, VIRGINIA, and CALVIN HARBOUR, INDIVIDUALLY, LARRY E. BALILES, DEPUTY SHERIFF OF PATRICK COUNTY, VIRGINIA, and LARRY E. BALILES, INDIVIDUALLY,	)))COMPLAINT)))))))

and

MARTHA SUE FAIN, AGENT AND EMPLOYEE OF SHERIFF'S DEPARTMENT OF PATRICK COUNTY, VIRGINIA, and MARTHA SUE FAIN, INDIVIDUALLY,

Defendants.

Plaintiff respectfully alleges as follows:

1. The matter in controversy exceeds the sum of $10,000.00, exclusive of costs and interest. This action rises under Title 42 of the United States Code §1983. This Court has jurisdiction pursuant to Title 28 of the United States Code §§1331 and 1343. The Plaintiff is a permanent citizen of Patrick County, Commonwealth of Virginia, at present residing in Richmond, Virginia. At all times pertinent to this Complaint, the Defendant Harbour was the duly elected Sheriff of Patrick County, Virginia, the Defendant Baliles was a duly appointed Deputy Sheriff of Patrick County, Virginia, and the

Defendant Fain was an agent and employee of the Sheriff's Department of Patrick County, Virginia. In doing the acts and things hereinafter set forth said Defendants were acting in their respective capacities as stated, under color of state law, and within the scope of their respective duties. All acts and omissions herein complained of occurred in the Western District of Virginia.

2. That during the late winter and spring of 1977, the Defendant Baliles, acting under the supervision and control of Defendant Harbour, commenced an investigation into possible illicit drug activity in and about Patrick County, Virginia. In this, Defendant Baliles solicited, procured and secured the assistance of Defendant Fain, with the knowledge and approval of Defendant Harbour. It was originally anticipated that Defendant Fain would help the Sheriff's Department in contemplated

investigative efforts by acting in the limited capacity of what is commonly known and referred to as an "informant".

3. Prior to the winter and spring of 1977, and at all times pertinent hereto, the Defendant Fain was well known in the community in which she lived, and in the circles in which she moved, as a person who was emotionally unstable and totally unreliable. In fact, Defendant Fain had no training or experience whatsoever in regard to her projected role and was mentally and emotionally hopelessly unfit for the law enforcement responsibilities contemplated, all of which was known, or should have been known, to the Defendants Harbour and Baliles.

4. During her relatively short tenure in the limited capacity as a mere "informant", the Defendant Fain demonstrated incompetency and unreliability in that, among other things, she repeatedly supplied

the officers with insufficient, false and misleading information. The Defendant Fain's failings and shortcomings were repeatedly made known to the Defendants Baliles and Harbour and her unreliable reputation became a matter of common knowledge even within the Sheriff's Department. Several responsible officers declined to pursue investigative efforts in matters in which the Defendant Fain had participated, or in which she was participating.

5. Notwithstanding her failure as an "informant", and totally undaunted by specific warnings and an ever widening reputation for unreliability, the Defendant Baliles, acting under the supervision and control of Defendant Harbour, proceeded to give to the Defendant Fain additional, extremely important and more demanding duties and responsibilities, without formal training of any kind, and with woefully inadequate informal briefing. The Defen-

dant Fain was thereby made an "undercover agent" of the Sheriff's Department and was imbued with the duties and responsibilities normally and properly delegated to the most skilled and highly trained officers. That the intended role of undercover agent was demanding and could not be delegated to irresponsible persons was well known to Defendants Harbour and Baliles because of a previous ill-fated, scandalous drug investigation. In the aforesaid instance, said Department had entrusted important undercover duties to an untrained, irresponsible individual, the end result being that numerous criminal prosecutions were aborted because of the previous agent's conduct. In this new responsibility, among other things, the Defendant Fain was charged with the responsibility of making "buys" from suspected drug sellers, securing the contraband for evidence, all with a view toward criminal

prosecution in a court of law based on the uncorroborated efforts of the Defendant Fain.

6. Throughout her tenure as "undercover agent" the Defendant Fain continued to demonstrate unreliability and incompetence. Recognizing to some extent her own shortcomings, she entreated the Defendant Baliles to relieve her of her duties, which request was steadfastly refused even though Defendant Baliles was independently warned by other officers of her lack of reliability and competence. Notwithstanding Defendant Fain's request to be relieved, and in total disregard and indifference to the rights of the public, the Defendant Baliles, and other members of the Sheriff's Department who were active in the ongoing investigative effort, continued to pressure the Defendant Fain for successful drug acquisition results.

7. Proceeding without training or experience in an ill-fated effort to accomplish the desired "results", the Defendant Fain was unable to make sufficient bona fide drug buys to satisfy her superiors. Being frustrated, afraid, and confused, the Defendant Fain then embarked on an intentional, voluntary course of wilful fabrication and perjury directed at unsuspecting, totally innocent, citizens in the community.

(NOTE: WITT'S COMPLAINT CONTINUES)

8. During the course of her undercover work aforesaid, the Defendant Fain's attention was directed, without probable cause, to the Plaintiff. Having been instructed by her superiors to "get Johnny Witt" the Defendant Fain tried, by telephone on several occasions, to purchase drugs from the Plaintiff. On each such occasion, Defendant Fain was summarily rebuffed and rejected by the Plaintiff

who advised her in no uncertain terms that he did not have access to drugs and did not want to have anything to do with the Defendant Fain and her ostensible need for drugs.

9. Thus unable to make a legitimate "buy" from the Plaintiff, but still being pressured to do so, the Defendant Fain falsely related and falsely reported to her superiors in charge of the investigative effort that she had in fact made two, unrelated, separate buys of marijuana from the Plaintiff Witt, when in truth and fact no such buys had been made. In this, among other things, the Defendant Fain supplied marijuana for use as evidence in Court from a source best known to her and falsely reported it had been obtained from the Plaintiff Witt.

10. Notwithstanding her reputation, demonstrated lack of reliability, and warnings not to rely on the findings and

reports of Defendant Fain, the Defendants Baliles and Harbour accepted the reports of the Defendant Fain without question or reservation. Despite specific warnings not to do so, the Defendants Harbour and Baliles sought and obtained felony indictments against the Plaintiff Witt, and other innocent citizens, based solely on the false, perjured, unfounded testimony of the Defendant Fain.

11. The two indictments were made public and a criminal warrant issued for the arrest of Plaintiff Witt, who had no previous knowledge of the felony accusations against him and was completely innocent thereof. Plaintiff Witt had theretofore been an exemplary citizen and enjoyed an excellent reputation. All indictments against the Plaintiff Witt were subsequently dismissed, without trial, when the Defendant Fain finally admitted her fabrications and false testimony, but

not until the innocent Plaintiff had unnecessarily suffered great humiliation, embarrassment, inconvenience, and anguish, all to his permanent shame and damage.

12. The Defendants Baliles and Harbour were charged with the usual ordinary expected constitutional duties attendant their respective offices, including responsibilities to the Plaintiff and the public in general. At all times pertinent hereto, said Defendants knew, or with the most perfunctory exercise of care should have known, the lack of reliability, incompetence and general inability of the Defendant Fain to perform the important, difficult, critical requirements of law enforcement being entrusted to her. Notwithstanding this, the Defendants Harbour and Baliles delegated said responsibility to the Defendant Fain in total disregard and callous indifference to the foreseeable consequences and the constitu-

tionally protected rights of Patrick County citizenry. In so doing, the employment, retaining and supervision of the Defendant Fain was in gross, reckless, wanton and/or negligent disregard of rights, privileges and immunities secured to the Plaintiff Witt, and others similarly situated, by the Fourteenth Amendment to the United States Constitution. Among other things, the acts of omission and commission herein attributed to the Defendants Baliles and Harbour, and the actions hereinabove attributed to the Defendant Fain, jointly and severally, directly and foreseeably, deprived the Plaintiff Witt of his right and privilege to be secure in his personal liberty; to be free of false unfounded public accusations of wrongdoing without probable cause; to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony; to be free of unwarranted public

disdain and ridicule; and, be secure in his good name, reputation, honor and integrity.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for compensatory damages in the sum of One Hundred Thousand Dollars ($100,000), and punitive damages in the sum of Two Hundred Fifty Thousand Dollars ($250,000).

JOHNNY WITT

By_____
Of Counsel

(NOTE: BOWMAN'S COMPLAINT CONTINUES)

8. Thus unable to make sufficient legitimate "buys" to satisfy her superiors, but still being pressured to do so, the Defendant Fain falsely related and falsely reported to her superiors in charge of the investigative effort that she had in fact made two, unrelated, separate buys of illicit drugs from the Plaintiff Bowman,

when in truth and fact no buys had been made. In this, among other things, the Defendant Fain supplied drugs for use as evidence in Court from a source best known to her and falsely reported it had been obtained from the Plaintiff Bowman. The Defendant Fain had singled out the Plaintiff Bowman as a target of the unwarranted charges because of a personal grudge and dislike for Plaintiff Bowman.

9. Notwithstanding her reputation, demonstrated lack of reliability, and warnings not to rely on the findings and reports of Defendant Fain, the Defendants Baliles and Harbour accepted the reports of the Defendant Fain without question or reservation. Despite specific warnings not to do so, the Defendants Harbour and Baliles sought and obtained felony indictments against the Plaintiff Bowman, and other innocent citizens, based solely on the false, perjured, unfounded testimony

of the Defendant Fain.

10. The two indictments were made public and a criminal warrant issued for the arrest of Plaintiff Bowman, who had no previous knowledge of the felony accusations against her and was completely innocent thereof. All indictments against the Plaintiff Bowman were subsequently dismissed, without trial, when the Defendant Fain finally admitted her fabrications and false testimony, but not until the innocent Plaintiff had unnecessarily suffered great humiliation, embarrassment, inconvenience, and anguish, all to her permanent shame and damage.

11. The Defendants Baliles and Harbour were charged with the usual ordinary expected constitutional duties attendant their respective offices, including responsibilities to the Plaintiff and the public in general. At all times pertinent hereto, said Defendants knew, or with

the most perfunctory exercise of care should have known, the lack of reliability, incompetence and general inability of the Defendant Fain to perform the important, difficult, critical requirements of law enforcement being entrusted to her. Notwithstanding this, the Defendants Harbour and Baliles delegated said responsibility to the Defendant Fain in total disregard and callous indifference to the foreseeable consequences and the constitutionally protected rights of Patrick County citizenry. In so doing, the employment, retaining and supervision of the Defendant Fain was in gross, reckless, wanton and/or negligent disregard of rights, privileges and immunities secured to the Plaintiff Bowman, and others similarly situated, by the Fourteenth Amendment to the United States Constitution. Among other things, the acts of omission and commission herein attributed to the Defendants Baliles and

Harbour, and the actions hereinabove attributed to the Defendant Fain, jointly and severally, directly and foreseeably, deprived the Plaintiff Bowman of her right and privilege to be secure in her personal liberty, to be free of false unfounded public accusations of wrongdoing without probable cause; to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony; to be free of unwarranted public disdain and ridicule.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for compensatory damages in the sum of Thirty Five Thousand Dollars ($35,000), and punitive damages in the sum of One Hundred Fifty Thousand Dollars ($150,000).

SARAH B. BOWMAN

By_____
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Danville Division

JOHNNY WITT, Plaintiff v. CALVIN HARBOUR, SHERIFF OF PATRICK COUNTY, VIRGINIA, AND CALVIN HARBOUR, INDIVIDUALLY, LARRY E. BALILES, DEPUTY SHERIFF OF PATRICK COUNTY, VIRGINIA, AND LARRY E. BALILES, INDIVIDUALLY, MARTHA SUE FAIN, AGENT AND EMPLOYEE OF SHERIFF'S DEPARTMENT OF PATRICK COUNTY, VIRGINIA, AND MARTHA SUE FAIN, INDIVIDUALLY, and THE COUNTY OF PATRICK, VIRGINIA, Defendants	AMENDED COMPLAINT

Plaintiff respectfully alleges as follows:

COUNT I

1. The Plaintiff incorporates by reference the entirety of the Complaint

previously filed by him against Calvin Harbour, Larry E. Baliles and Martha Sue Fain to be read as a part hereof as if set forth verbatim. A copy of said Complaint is attached as Exhibit A. Pursuant to the applicable law at this time, it is now alleged that the amount in controversy exceeds the sum of $15,000.00 exclusive of costs and interest.

2. The County knew, should have known, or had imputed knowledge of the allegations aforesaid, including particularly but not limited to paragraph 5. Such conduct by parties acting for and under the supervision of the County constitutes a pattern and custom of direct misfeasance and/or nonfeasance in failing to train, supervise and review and discipline members, agents and employees of the Sheriff's Department.

3. The County's supervision and training of such department's members,

agents and employees was so severely deficient as to reach the level of gross negligence and/or deliberate indifference making deprivation of constitutional rights foreseeable and probable.

COUNT II

1. The Plaintiff incorporates by reference the entirety of the Complaint previously filed by him against Calvin Harbour, Larry E. Baliles and Martha Sue Fain to be read as a part hereof as if set forth verbatim. A copy of said Complaint is attached as Exhibit A. Pursuant to the applicable law at this time, it is now alleged that the amount in controversy exceeds the sum of $15,000.00, exclusive of costs and interest.

2. The Sheriff, as a duly elected law enforcement official of the County was imbued with the duty and responsibility of setting and carrying out the policy of the County as to law enforcement, including

said County's policy as to undercover operations. In this context, the Sheriff's edicts and acts represent the County's official policy.

3. In discharge of said duty and responsibility the Sheriff acted with gross negligence and in reckless disregard of the constitutional rights of citizenry in setting and maintaining a policy and pattern of substandard, severely deficient undercover operations which foreseeably would result in violation of those rights.

WHEREFORE, Plaintiff demands judgment against the Defendant County, jointly and severally with Defendant's previously named, for compensatory damages in the sum of One Hundred Thousand Dollars ($100,000), and punitive damages in the sum of Two Hundred Fifty Thousand Dollars ($250,000).

JOHNNY WITT

By_____
Of Counsel

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

SARAH B. BOWMAN
Plaintiff

vs. CIVIL ACTION NO. 79-0058

CALVIN HARBOUR, Sheriff
of Patrick County
LARRY E. BALILES, Deputy
Sheriff
MARTHA SUE FAIN, Employee
of Sheriff's Dept. FINAL ORDER
COUNTY OF PATRICK, VIRGINIA
Defendants

This case is before the Court on the motion of the defendants to dismiss.

It appearing to the Court that the allegations in the complaint are similar, if not identical to the claims asserted in the case of Witt vs. Harbour, et. al. Civil Action No. 79-0057, and that the Court's ruling in the Witt case is controlling herein:

It is accordingly ADJUDGED and ORDERED as follows:

(1) That a copy of the Court's Opinion in Witt vs Harbour, Civil Action No. 79-0057, filed on April 23, 1980, be placed in this file.

(2) That the complaint be dismissed and stricken from the docket of the Court for the reasons stated by the Court in the Witt opinion.

Enter this 23rd day of April, 1980.

James C. Turk

CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JOHNNY WITT

Plaintiff

CIVIL ACTION NO.
79-0057 (D)

v.

F I N A L O R D E R

CALVIN HARBOUR, et al

Defendants

In accordance with the court's Memorandum Opinion this date entered, plaintiff's complaint is dismissed and this case is ordered stricken from the docket.

DATED: This 22nd day of April, 1980.

James C. Turk

Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

JOHNNY WITT
Plaintiff

CIVIL ACTION NO.
79-0057(D)

v.

MEMORANDUM OPINION

CALVIN HARBOUR,
et al
Defendants

BY:
James C. Turk, Chief
U. S. District Judge

Plaintiff, Johnny Witt, brings this action pursuant to Title 42 § 1983, naming as defendants the County of Patrick, Virginia, the County Sheriff, Calvin Harbour, a deputy, Larry E. Baliles, and an employee, Martha Sue Fain. Plaintiff maintains that Miss Fain falsified evidence against him which led to his indictment and arrest and for this reason and because of his innocence, charges have been dropped. The County, Sheriff Harbour, and Deputy Sheriff Baliles, have been joined as defendants on the theory that their actions in failing to supervise Miss Fain evinced reckless dis-

regard for the rights of others in general and plaintiff in particular. The County of Patrick has moved to dismiss maintaining that it has neither the responsibility nor the right under Virginia law either to train or control the actions of the County Sheriff and his deputies. Sheriff Harbour and Deputy Baliles have moved to dismiss maintaining that the bases of plaintiff's action are claims of defamation and negligent deprivation of liberty although "[t]he former has been held an inappropriate basis for a § 1983 suit . . .[1] [and] the latter is not actionable when, as here, it allegedly contributes to a grand jury indictment." Finding no violation of a constitutional right, the court will dismiss.

"The first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right 'secured by the

Constitution and laws'" of the United States. Baker v. McCollan, 99 S.Ct. 2689, 2692 (1979); Martinez v. California, 100 S.Ct. 553, 558 (1980). When a person is sued for reckless supervision, the inquiry, of course, must begin with an examination of the conduct of the subordinate who is alleged to have violated plaintiff's constitutionally protected rights. That is, assuming that defendant Fain was the moving force in initiating criminal proceedings against plaintiff knowing him to be innocent, what constitutional guarantee, if any, did she infringe?

The Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches, Giordenello v. United States, 357 U.S. 480, 485-486 (1958) and its proscriptions are applicable to the states through the Fourteenth Amendment. Wolf v. Colorado,

338 U.S. 25, 27-28 (1949); Pritchard v. Perry, 508 F.2d 423, 424 (4th Cir. 1975). See Baker v. McCollan, supra, at 2694. Consequently, violations of Fourth Amendment rights by persons acting under color of sate law are redressable under § 1983. Pritchard v. Perry, supra, at 424-425. However, "it has long been settled that an indictment by a properly constituted grand jury conclusively determines the existence of probable cause and provides the authority for an arrest warrant to issue." Rodriguez v. Ritchey, 556 F.2d 1185, 1191 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978). The requirements of procedural due process were met, therefore, before plaintiff was deprived of his liberty.[2] Consequently, while the facts alleged would serve as a basis for civil action for malicious prosecution[3] and for the

criminal charge of perjury[4] against Miss Fain, they do not establish a violation of constitutional magnitude. That is, malicious prosecution by a person acting under the color of his or her office does not, by that fact alone, rise to constitutional proportions. Pollard v. Baskerville, 481 F.Supp. 1157, 1160 (E.D.Va. 1979); Curtis v. Rosso and Mastracco, Inc., 413 F.Supp. 804, 809 (E.D.Va. 1976); Pyles v. Keane, 418 F.Supp. 269, 276 (S.D.N.Y. 1976); Rosales v. Lewis, 454 F.Supp. 956, 960 (S.D.Iowa 1978). Contra, Voytko v. Ramada Inn of Atlantic City, 445 F.Supp. 315 (D.N.J. 1978). As the Supreme Court stated in Baker, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be

sought in state court under traditional tort law principles." Baker v. McCollan, supra, at 2695-2696. As there has been no deprivation of constitutional magnitude, neither defendant Fain's superiors nor the County[5] would be liable on the theory of reckless supervision[6] under § 1983. Accordingly, defendants' motion to dismiss must be granted.

DATED: This 22nd day of April, 1980.

James C. Turk

Chief United States
District Judge

* * *

FOOTNOTES

1. Paul v. Davis, 424 U.S. 693 (1976).

2. Plaintiff cites Reeves v. City of Jackson, 608 F.2d 644 (5th Cir. 1979) for the proposition that a person arrested without probable cause is denied rights under the Fourth and Fourteenth Amendments and can sue the responsible state authorities under §1983. That is undoubtedly a correct statement of law. However, in the present case, as in Rodriguez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1047 (1978), referred to above, an indictment preceded plaintiff's arrest, an event which conclusively establishes probable cause.

3. In the constitutional sense, to say that the return of an indictment conclusively establishes probable cause for a warrant of arrest to issue is not to say that if the true facts were known they would establish probable cause. Rather, it is to say that plaintiff has been afforded all the protection to which he is entitled under the Constitution. Under state tort law principles, the question is not whether it would be procedurely permissible to arrest the plaintiff, but whether the one who initiated or was responsible for initiating criminal proceedings has "a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense."

Prosser, The Law of Torts, 4th Ed., §119. See Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 684, 152 S.E.2d 271, 275 (1967). It requires, therefore, "an honest belief in the guilt of the accused." Id. Munger v. Cox, 146 Va. 574, 131 S.E. 841, 844 (1926). Accordingly, one who commits perjury to obtain an indictment cannot by the return of that indictment assert that probable cause has been conclusively established; instead, the return of the indictment is merely evidence that probable cause exists and may be impeached by evidence that it was procured through perjury. See Restatement (Second) of Torts, §664(2); The Law of Torts, supra, §119, p. 846; Westreich v. McFarland, 429 F.2d 947, 949 (4th Cir. 1970).

In the present case, the facts alleged include all the elements of malicious prosecution under Virginia law. Bill Edwards Oldsmobile, Inc. v. Carey, 219 Va. 90, 96, 244 S.E.2d 767 (1978). Furthermore, a principal may be held liable for the act of his agent in instituting a malicious prosecution "when expressly authorized, or when his authority to act may fairly be inferred from the nature and scope of the employment." Freezer v. Miller, 163 Va. 180, 199, 176 S.E. 159, 166 (1934). A sheriff is liable for the acts of his deputies. Miller v. Jones, 9 Gratt. 584, 50 Va. 584, 602-603 (1853). If the facts alleged are proven, therefore, Sheriff Harbour would be civilly liable for the acts of Miss Fain. Deputy Baliles would also be liable if he authorized those acts.

4. Va. Code Ann. §18.2-434.

5. The office of sheriff is an elected position created by the Virginia Constitution, Art. III, §4. His duties are prescribed by general law, Va. Code Ann. §15.1-40.1 (Cum. Supp. 1979), and are not subject to the control of the local political subdivision which he serves. His deputies are appointed and serve at his discretion, Va. Code Ann. 15.1-48, and like the sheriff, are not subject to the control of the governing body of the local government. Whether the sheriff is an employee of the state or the county, however, would not be dispositive of plaintiff's claims if a constitutional violation were found. The question is not by whom is the tort-feasor employed. Rather, it is whether he is carrying out official county policy of some nature. See Monell v. N.Y. City Dept. of Social Services, 436 U.S. 658, 691 (1978); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978). If a constitutional tort had been committed and if it were committed pursuant to official county policy then the county would be liable irrespective of the immunities of the tort-feasors. Owen v. City of Independence, 48 U.S.L.W. 4389 (April 16, 1980). The requirement that action be taken pursuant to official county policy is simply not met when a sheriff or his employees, who are not subject to the control of the local political subdivision, are functioning to enforce the general criminal laws of the state. For this additional reason, plaintiff's

claims against the county are without merit.

6. A superior may be held liable for failing to supervise or train his subordinates if his dereliction is so severe as to reach the level of gross negligence or deliberate indifference to the deprivation of plaintiff's constitutional rights. See Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), cert. denied sub nom, 100 S.Ct. 483 (1980); Popow v. City of Margate, 476 F.Supp. 1237 (D.N.J. 1979). See generally, Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979). No matter how reckless the supervision, however, the injury must be constitutionally significant.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1434

Johnny Witt,

Appellant,

v.

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff, Patrick County; Martha Sue Fain, Employee of Sheriff's Office, Patrick County; County of Patrick, Virginia,

Appellees.

No. 80-1435

Sarah B. Bowman,

Appellant,

v.

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff, Patrick County; Martha Sue Fain, Employee of Sheriff's Department; Individually and in their official capacity; County of Patrick, Virginia,

Appellees.

Appeals from the United States District Court for the Western District of Virginia, at Danville. James C. Turk, Chief Judge.

Argued: December 2, 1980
Decided: February 17, 1981

Before BRYAN, Senior Circuit Judge, RUSSELL and MURNAGHAN, Circuit Judges.

Robert W. Mann (Young, Kiser, Haskins, Mann, Gregory & Young, Ltd. on brief for Appellants; Thomas T. Lawson (John D. Eure, Woods,Rogers, Muse, Walker and Thornton on brief) for Appellees Calvin Harbour and Larry E. Baliles; Anthony P. Giorno, Assistant Commonwealth's Attorney for Appellee County of Patrick, Virginia.

PER CURIAM:

Johnny Witt and Sarah B. Bowman, appellants, filed essentially identical complaints against Patrick County, Virginia, Calvin Harbour and Larry E. Baliles, respectively Sheriff and Deputy Sheriff of the County, and Martha Sue Fain, an informant, seeking damages under 42 U.S.C. § 1983. The two cases were consolidated for pretrial motions as well as for this appeal from the District Court's order of April 23, 1980, dismissing the complaints under Fed.R.Civ.P. 12(b)(6).

Specifically, appellants charged Harbour and Baliles with negligence or

recklessness in retaining Fain as an agent in their investigation of illegal drug activities in Patrick County. The complaint was that the Sheriff and his Deputy continued to use Fain despite their knowledge of her incompetence and unreliability. Appellants were arrested pursuant to warrants issued upon indictments returned by a grand jury acting on Fain's perjured testimony. The indictments were dismissed when her perjury was disclosed in pretrail proceedings.

The District Court held that appellants could not allege the unconstitutionality of arrests made under warrants issued on indictments returned by a properly constituted grand jury. Because appellants had identified no other violation of constitutionally protected rights, the Court determined it necessary to dismiss the § 1983 complaints. Baker

v. McCollan, 443 U.S. 137, 140 (1979).

We find no fault with the Court's analysis and agree that, on the facts of this case, appellants' remedies, if any, lie in actions under State law. The judgment of the District Court is therefore

Affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 80-1434 (L)

Johnny Witt,

Appellant,

versus

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff Patrick County; Martha Sue Fain, Employee of Sheriff's Office, Patrick County; County of Patrick County,

Appellees.

No. 80-1435

Sarah B. Bowman,

Appellant,

versus

Calvin Harbour, Sheriff of Patrick County; Larry E. Baliles, Deputy Sheriff; Martha Sue Fain, Employee of Sheriff's Department; Individually and in their official capacity; County of Patrick, Virginia,

Appellees.

ORDER

FILED MAR 17 1981
WILLIAM K. SLATE, II, CLERK

Upon consideration of appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Russell, and Judge Murnaghan.

For the Court,

William K. Slate, II

CLERK

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHNNY WITT, et al., *Petitioners*

v.

CALVIN HARBOUR, et al., *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS WITT, HARBOUR, AND THE COUNTY OF PATRICK, VIRGINIA, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A PETITIONER ARRESTED ON A FACIALLY VALID WARRANT FOLLOWING INDICTMENT BY A PROPERLY CONSTITUTED GRAND JURY CAN STATE A CAUSE OF ACTION UNDER 42 U.S.C. §1983 FOR ARREST WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

II. WHETHER A COUNTY IN VIRGINIA HAS POWER OR A DUTY TO TRAIN OR SUPERVISE MEMBERS OF THE COUNTY SHERIFF'S DEPARTMENT SO AS TO RENDER THE COUNTY LIABLE FOR FAILURE OF THE SHERIFF IN THIS REGARD.

III. WHETHER A COMPLAINT SUFFICIENTLY ALLEGES THAT THE ACTIONS OF INDIVIDUAL DEFENDANTS WERE UNDERTAKEN PURSUANT TO AN "OFFICIAL POLICY" OF THE COUNTY REGARDING UNDER-COVER AGENTS WHERE ONLY A SINGLE INCIDENT IS ALLEGED AS THE BASIS FOR THE ASSERTED OFFICIAL POLICY.

PARTIES

Johnny Witt;
Sarah B. Bowman;
Calvin Harbour;
Larry E. Baliles;
Martha Sue Fain;
and
The County of Patrick, Virginia.

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No. 80-2120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHNNY WITT, et al., *Petitioners*

v.

CALVIN HARBOUR, et al., *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS WITT, HARBOUR, AND THE COUNTY OF PATRICK, VIRGINIA, IN OPPOSITION

OPINION BELOW

The opinion of the United States District Court for the Western District of Virginia is now reported at 508 F. Supp. 378 (W.D. Va. 1980).

STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari ("Petition"), Johnny Witt and Sarah B. Bowman seek reversal of the United States District Court for the Western District of Virginia's dismis-

sal pursuant to Federal Rule of Civil Procedure 12(b)(6) of their virtually identical complaints under 42 U.S.C. §1983 and the affirmance, in an unpublished *per curiam* decision, of that dismissal by the United States Court of Appeals for the Fourth Circuit. The defendants below were Calvin Harbour, formerly Sheriff of Patrick County, Virginia, Larry Baliles, one of Harbour's deputies, Martha Sue Fain, a private citizen allegedly employed by the Patrick County Sheriff's Department as an informant and undercover agent in connection with investigations into illegal drug transactions, and the County of Patrick, Virginia. Witt's and Bowman's cases were consolidated by agreement of counsel for pretrial motions and have been consolidated for all subsequent proceedings.

(a) The Complaints.

The original complaints alleged that Baliles, acting under the supervision and control of Harbour and with Harbour's knowledge and approval, employed Fain as an informant and undercover agent in connection with an investigation of illicit drug activity. Allegedly, Harbour and Baliles should have known of Fain's unreliability and unsuitability for these tasks. Petitioners alleged, and Harbour and Baliles have acknowledged, that Fain reported she had bought drugs from petitioners and gave investigating officers drugs allegedly so bought when in fact Fain had not been involved in any drug transactions with petitioners.

Fain presented her "evidence" of purchases of illicit drugs to a grand jury that returned indictments against petitioners. Criminal warrants thereupon issued for the arrest of petitioners. These indictments were subsequently dismissed when Fain's perjury was first discovered during pretrial proceedings.

Petitioners have not alleged that Harbour and Baliles had actual knowledge of Fain's perjury before the indictments issued or acted with malice toward petitioners. (*See* Petition at 15.)[1] Rather, petitioners alleged that Harbour and Baliles "should have known" of Fain's "lack of reliability" and "incompetence."

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[1]The complaints and opinions and orders of the courts below are reprinted starting at page 28 of the Petition.

(Witt Complaint ¶12, Bowman Complaint ¶11; Petition at 38,43.) The legal core of the complaints is as follows:

> [T]he employment, retaining and supervision of the Defendant Fain was in gross, reckless, wanton and/or negligent disregard of rights, privileges and immunities secured to the [petitioners], and others similarly situated, by the Fourteenth Amendment to the United States Constitution. Among other things, the acts of omission and commission herein attributed to the Defendants Baliles and Harbour, and the actions hereinabove attributed to the Defendant Fain, jointly and severally, directly and foreseeably, deprived the [petitioners] of [their] right and privilege to be secure in [their] personal liberty; to be free of false unfounded public accusations of wrongdoing without probable cause; to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony; to be free of unwarranted public disdain and ridicule.

(Witt Complaint ¶12, Bowman Complaint ¶11; Petition at 39-40, 43-44.)

Amended complaints added the County of Patrick as a defendant and alleged a constitutionally impermissible pattern of misfeasance and nonfeasance condoned by the County and effectuated by Sheriff Harbour, whose acts were alleged to constitute the County's official policy. (Petition at 45-48.)

Harbour and Baliles moved for dismissal under Rule 12(b)(6), and Patrick County moved for dismissal under Rules 12(b)(6) and 12(b)(7). Fain filed no responsive pleading.

(b) The Decisions Below.

In addressing the motions to dismiss under Rule 12(b)(6), the district court, following the analysis of this Court in *Baker* v. *McCollan*, 443 U.S. 137, 140 (1979), inquired first whether any constitutional guarantee had been infringed by the conduct alleged in the complaints. Petitioners urged that their complaints stated a claim for arrest without probable cause in violation of the Fourth

and Fourteenth Amendments. But the district court, relying on *Rodriguez* v. *Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1047 (1978), held that an indictment by a properly constituted grand jury conclusively determines, for constitutional purposes, the existence of probable cause and provides the authority for an arrest warrant to issue. The district court therefore ruled that, by having their cases presented to the grand jury, which returned indictments, the plaintiffs received all the due process to which they were constitutionally entitled at the indictment stage. There being no constitutional deprivation, no defendant could be liable on petitioners' theory of reckless supervision under §1983. The district court accordingly dismissed the complaints as to all defendants.

In an unpublished *per curiam* opinion, the Fourth Circuit affirmed the district court's analysis and result, observing that petitioners had identified the purported arrest without probable cause as the only constitutional violation alleged in the complaints.

SUMMARY OF REASONS FOR DENYING THE WRIT

The courts below fully considered and correctly decided the central issue in this case. Under *Baker* v. *McCollan*, 443 U.S. 137 (1979), a plaintiff must identify a precise constitutional violation in order to state a cause of action under 42 U.S.C. §1983. Petitioners have construed their own complaints to allege a single constitutional violation: arrest without probable cause in violation of the Fourth and Fourteenth Amendments. But the complaints show that petitioners were arrested upon warrants issued after petitioners were indicted by a grand jury, and there are no allegations that the grand jury was improperly constituted or that the warrants were facially invalid. Under these circumstances, sound authority holds that the grand jury's determinations of probable cause are conclusive for constitutional purposes. Since it was clear from the face of the complaints here that no unconstitutional arrests occurred, the complaints were properly dismissed.

The Fourth Circuit's decision in the case does not conflict with decisions from other circuits; the cases cited by petitioners either involve an arrest before indictment or in fact support the

decision of the Fourth Circuit here. Nor is the prior decision of this Court regarding impeachment of affidavits underlying a search warrant relevant to the decisions below concerning the conclusive effect of a grand jury indictment, since the constitutional safeguards on the accuracy of grand jury determinations of probable cause are fundamentally different from those surrounding probable cause findings made by officers or magistrates.

Finally, counties in Virginia have no power or duty to train or supervise members of the County's Sheriff's Department, and so cannot be held liable for the Sheriff's alleged failures in this regard. A complaint, moreover, is legally insufficient under §1983 and *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), when it alleges only a single prior incident as the basis for allegations that actions of individual defendants constituted a custom and usage that was the official policy of the County.

REASONS FOR DENYING THE WRIT

(a) The Central Issue in This Case Was Correctly Decided Below: An Arrest on a Facially Valid Warrant Following Indictment by a Properly Constituted Grand Jury Cannot be the Basis for a Complaint under 42 U.S.C. §1983 for Arrest Without Probable Cause.

The essence of petitioners' claim is that they were unconstitutionally arrested without probable cause in that respondents Harbour and Baliles allegedly mishandled a drug investigation with the result that the petitioners were indicted and arrested on drug charges when an informant perjured herself before the indicting grand jury. But petitioners have conceded that neither Harbour nor Baliles knew beforehand that the informant was going to perjure herself or actively encouraged the perjury.[8] There are no allegations that either Harbour or Baliles acted mali-

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[8]Petition at 15. Counsel for petitioners also acknowledged in oral argument before the United States Court of Appeals for the Fourth Circuit that neither Harbour nor Baliles was the source of the alleged instruction to "get Johnny Witt" that is recited in ¶8 of Witt's original complaint (Petition at 35).

ciously toward petitioners or with deliberate intent to harm them;[3] the allegations are of negligent and reckless conduct with respect to the overall drug investigation and the use of the informant. The record also is uncontradicted that the charges against petitioners were dismissed when the perjury was first discovered during pretrial proceedings.

As the district court recognized, the starting point for analysis of whether a complaint states a cause of action under §1983 must be this Court's recent pronouncement that:

> The first inquiry in any §1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws" [of the United States].

Baker v. *McCollan*, 443 U.S. 137, 140 (1979). In *Baker*, this Court ruled that while a person arrested on a facially valid warrant and held in jail for eight days as a result of mistaken identity has indeed been deprived of his liberty, this deprivation occurred in accordance with due process of law. Even the Sheriff's alleged *intentional* failure to investigate an absolutely dispositive and easily verifiable defense, 443 U.S. at 143, did not violate due process. This Court said:

> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. If it did, §1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released. . . .
>
> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law." . . .

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[3]Petition at 15. Nevertheless, certain language in the Petition could be misread as indicating that malice has been alleged.

> . . .Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. . . .

443 U.S. at 145-46 (footnotes omitted).

The complaints in the case at bar are decidedly oblique when it comes to identifying "the precise constitutional violation with which [the defendants are] charged." *Baker* v. *McCollan*, 443 U.S. at 140. The allegations that the criminal prosecutions begun against petitioners exposed them to "great humiliation, embarrassment, inconvenience, and anguish, all to [petitioners'] permanent shame and damage" and constituted "false unfounded public accusations of wrongdoing without probable cause" that subjected petitioners to "unwarranted public disdain and ridicule" make out a classic state-law action for defamation. (Witt Complaint ¶¶11,12; Bowman Complaint ¶¶10,11; Petition at 38-40, 42-44). But this avenue is foreclosed to petitioners under §1983. *Paul* v. *Davis*, 424 U.S. 693 (1976).

Petitioners also alleged violation of asserted rights and privileges "to be secure in [their] personal liberty," "to be free of false unfounded public accusations of wrongdoing without probable cause," and "to be free of prosecutorial efforts prompted by and predicated upon unreliable information and perjured testimony." (Witt Complaint, ¶12; Bowman Complaint ¶11; Petition at 39,44). As the district court recognized, in light of the allegations of the informant's perjury petitioners might have made out a state-law cause of action for malicious prosecution against her. (508 F. Supp. at 379-80, Petition at 55.) Petitioners chose, however, not to shape their case along these lines, perhaps out of fear of being left without a solvent defendant or because of the statute of limitations applying to such actions. *See Morrison* v. *Jones*, 551 F.2d 939 (4th Cir. 1977).

Rather, once confronted with the implications of *Baker* v. *McCollan*, 443 U.S. 137 (1979), for any sort of unfocused constitutional attack, petitioners have consistently maintained, as the opinion of the Fourth Circuit notes, that arrest without probable cause is the sole constitutional violation they allege. (Petition at

64.) In support of their position, petitioners rely on cases, with which respondents do not quarrel, establishing that one who has not been indicted and who has been arrested without a valid warrant and without probable cause may have suffered a constitutional deprivation. (Petition at 16-17.)

But petitioners' assertion that *they* have suffered an unconstitutional arrest without probable cause fails beause an indictment by a properly constituted grand jury conclusively determines the existence of probable cause and validates the issuance of an arrest warrant. Petitioners have not alleged that the indictments upon which they were arrested were facially invalid or that the indicting grand jury was biased or illegally constituted. This being the case, the law prohibits a constitutional attack for lack of probable cause on the resulting indictment. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975); *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *Rodriguez* v. *Ritchey*, 556 F.2d 1185, 1191 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1047 (1978). Through the process of indictment by a proper grand jury, petitioners received all of the constitutional protection—all of the due process—to which they were entitled at this stage of the criminal process. *Cf. Baker* v. *McCollan*, 443 U.S. at 145-46.

In the leading case concerning the effect of a pre-arrest indictment in the §1983 context, *Rodriguez* v. *Ritchey*, the Fifth Circuit sitting *en banc* squarely addressed and rejected petitioners' theory. In *Rodriguez*, due to a complicated series of mechanical and human errors during a criminal investigation, Rodriguez, the §1983 plaintiff, became the victim of mistaken identity. The mistake was not discovered until some 15 months after her indictment and arrest on federal charges involving participation in illegal gambling operations. The charges against her were dismissed on the government's motion when the mistaken identification was discovered during pretrial discovery. Rodriguez then filed a *Bivens*-type action directly under the Fourth Amendment against the FBI agents who conducted the investigation that led to her misidentification, alleging an unconstitutional arrest without probable cause because of the deficient police investigation.

Upon a detailed and scholarly analysis, a plurality of the Fifth Circuit held as a matter of law that a person alleging arrest

pursuant to an indictment returned by a properly constituted grand jury has stated no violation of the Fourth Amendment. 556 F.2d at 1190-1192, 1194. The court of appeals ruled that when the district court discovered from the complaint that Rodriguez' arrest followed her indictment by a grand jury, it then became "apparent to a legal certainty that no constitutional violation had been committed as alleged" and the district court should have dismissed the action for want of jurisdiction or for failure to state a claim upon which relief could be granted. 556 F.2d at 1192. Two concurring judges endorsed the plurality's reasoning and disposition and reserved decision only on whether a police officer who maliciously or in bad faith seeks to obtain an indictment may escape liability. 556 F.2d at 1194-95.

The prevailing opinion in *Rodriguez* is based on longstanding precedent. 556 F.2d at 1191 n.22 (cases collected). Chief among these authorities is the decision in *Costello* v. *United States*, 350 U.S. 359, 363 (1956), where this Court held that an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits.[4] Such an indictment, this Court held, is not subject to challenge for the sufficiency, adequacy, or competency of the evidence before the grand jury.[5]

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[4]An indictment is sufficient if it contains the elements of the offense charged, if it fairly informs the defendant of the charge against which he must defend, and if it enables the defendant adequately to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Russell* v. *United States*, 369 U.S. 749, 763-64 (1962).

[5]In light of the plurality opinion in *Rodriguez*, the soundness of which has been ratified by *Baker* v. *McCollan*, 443 U.S. 137 (1979), the courts that have already passed on the case at bar have found it unnecessary to explore an alternative legal basis for dismissing the complaints here. In *Hahn* v. *Sargent*, 388 F. Supp. 445, 452 (D. Mass.), *aff'd*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), the court dismissed a §1983 complaint against a defendant who allegedly gave false testimony to a grand jury that was investigating the plaintiff and that subsequently indicted him. Observing that one who testifies falsely before a grand jury is liable in a criminal action for perjury, the court ruled that any such false testimony is privileged as a matter of public policy in civil actions, including those brought under §1983. The same reasoning led to summary judgment for the defendants in *Bryant* v. *Kentucky*, 490 F.2d 1273 (6th Cir. 1974). Virginia recognizes this absolute privilege against civil liability. *Watt* v. *McKelvie*, 219 Va. 645, 648-51, 248 S.E.2d 826, 828-29

(Footnote continued on next page)

Numerous cases exist, of course, affirming that persons arrested pursuant to some authority other than an indictment may actionably have been denied their rights under the Fourth and Fourteenth Amendments. For instance, when a person is arrested without a warrant, the constitutionally required determination of probable cause must initially be made by a police officer operating under field conditions. The officer's judgment is subject to later scrutiny by a neutral and detached judicial officer in a preliminary hearing, but the initiation of the criminal process, the arrest and consequent deprivation of liberty, have already occurred. Under these circumstances, the law gives no conclusive effect to the initial judgment about probable cause. The existence of this constitutional prerequisite to going forward with the criminal process may be contested at the preliminary hearing, or by way of application for a writ of habeas corpus challenging the legality of pretrial detention, or in a §1983 action for damages or declaratory or injunctive relief. *See generally Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6, 111-115, 117 n.19 (1975); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

But when the criminal process is initiated through investigation by a grand jury that returns an indictment, the federal Constitution recognizes a fundamentally different mechanism for safeguarding the probable cause determination. As Mr. Justice Black wrote for this Court in *Costello* v. *United States*:

> The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand

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(Footnote 5 continued)

(1978); *Elder* v. *Holland*, 208 Va. 15, 21, 155 S.E.2d 369, 374 (1967); *Penick* v. *Ratcliffe*, 149 Va. 618, 627-35, 140 S.E. 664, 667-70 (1927).

In a closely related context, the court in *Brawer* v. *Horowitz*, 535 F.2d 830 (3rd Cir. 1976), affirmed dismissal of a *Bivens*-type damage action alleging that the plaintiff had been deprived of his constitutional right to a fair trail by the perjured testimony of a witness. Observing that the claim at bottom amounted to one of "constitutional defamation," 535 F.2d at 837, the court based its ruling on the ancient common law immunity from civil liability enjoyed by witnesses in criminal proceedings. *Brawer* was cited with approval, and the absolute nature of witness immunity from §1983 actions confirmed, in *Burke* v. *Miller*, 580 F.2d 108 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. *The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.* Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. *It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.* And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. And in 1852 Mr. Justice Nelson on circuit could say "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof. . ."

350 U.S. at 361-63 (footnotes and citation omitted; emphasis added). Mr. Justice Powell writing for this Court has recently

underscored the unique confidence that our Constitution places in the determinations of the grand jury:

> The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution.

Gerstein v. *Pugh*, 420 U.S. 103, 117, n.19 (1975).

Under our Constitution, facially valid indictment by a proper grand jury is deemed a sufficient guaranty that probable cause underlies the criminal prosecution instituted by the indictment. Consistently with this position, no hearing is afforded for reviewing the basis for arrest following indictment. Likewise, pretrial confinement pursuant to a valid indictment cannot be challenged collaterally by way of application for a writ of habeas corpus. *See, e.g., United States ex rel. Potts* v. *Rabb*, 141 F.2d 45, 47 (3d Cir.), *cert. denied*, 322 U.S. 727 (1944); *Ellis* v. *New Jersey*, 282 F. Supp. 298, 302-03 (D. N.J. 1967), *aff'd per curiam*, 388 F.2d 988 (3d Cir. 1968) (adopting the reasoning of the district court). *Cf. Guthrie* v. *Boles*, 261 F. Supp. 852, 853-55 (N.D. W.Va. 1967). Nor, as *Rodriguez* v. *Ritchey*, reaffirms, can the grand jury's determination be challenged collaterally in a §1983 or *Bivens*-type action.

The grand jurors in the cases at bar could properly have considered a great many things, including their own knowledge, actual or supposed, of the petitioners as well as the results of the police investigation and the perjured testimony of Fain, in reaching their decisions to indict. Petitioners cannot, however, inquire into these matters by way of a §1983 suit. In the absence of allegations of bias or improper constitution in the grand jury or deficiency in the form of the indictments, the grand jury's determinations of probable cause are conclusive.

Respondents therefore respectfully submit that the circuit and district courts in the case at bar correctly decided that petitioners' indictments were conclusive on the issue of probable cause and that the complaints state no cause of action for unconstitutional arrest.

(b) The Decisions Below Do Not Conflict With Considered Opinions of Any Other Circuit.

Petitioners assert that the decisions below conflict with *Attreau* v. *Morris*, 357 F.2d 871 (7th Cir.), *cert. denied*, 385 U.S. 832 (1966). This case, however, affords no substantial support for petitioners' position.

First, *Attreau* involves a clearly-alleged instance of arrest without a warrant and without probable cause, 357 F.2d at 872-73, which of course *does* state a claim for relief under §1983. While the plaintiff in *Attreau* was ultimately indicted and included this incident in his recital of wrongs suffered, the criminal process was first brought to bear on the plaintiff through a warrantless arrest. Second, the *Attreau* court's discussion of the effect of indictment following arrest, 357 F.2d at 874-75, is uninformed by the federal law, cited in *Rodriguez* v. *Ritchey* and discussed in this brief, on the effect of indictments preceding arrest and relies entirely on analogy with state law relating to malicious prosecution. As the district court pointed out in the case at bar, the constitutional effect of a grand jury indictment for §1983 purposes is one thing; the effect of that indictment in a state civil action for malicious prosecution is quite another. (508 F. Supp. at 379-80, n.3; Petition at 58-59.) Finally, *Attreau* antedates *Baker* v. *McCollan*, 443 U.S. 137 (1979). Thus, its generalized pronouncements—which are not tied to specific constitutional guarantees—about what does and does not state a cause of action under §1983 are of extremely dubious authority.

Petitioners also apparently assert that the Fifth Circuit's opinon in *Rodriguez* v. *Ritchey* "is in direct conflict with" the Fourth Circuit's decision in this case. *Rodriguez* has been sufficiently discussed already to demonstrate that it is in harmony—and not in conflict—with the decisions in the case at bar. The district court below recognized this harmony. (508 F. Supp. at 379 and n.2; Petition at 55, 58 n.2.)

Petitioners try to distinguish *Rodriguez* on its facts from the case at bar. (Petition at 13-14.) But it is plain from the prevailing opinion in *Rodriguez*, 556 F.2d at 1192, 1194, that the only facts important to the *Rodriguez* court were that the plaintiff was indicted by a grand jury, alleged no impropriety in the constitu-

tion of the grand jury and no facial invalidity in the warrant, was arrested following indictment, and alleged no use of unreasonable force in the arrest. *Rodriguez* is squarely on point with the case at bar as regards these material facts.

Petitioners also seek to exploit the reservation by the concurring judges in *Rodriguez* of decision in a case where "an officer maliciously or in bad faith seek[s] to obtain an indictment from a grand jury." 556 F.2d at 1195. Yet petitioners admit they have not alleged and cannot prove that Harbour and Baliles knew of Fain's perjury, and it bears repeating here that, contrary to the implications of some portions of petitioners' argument, petitioners nowhere have alleged malice, nor is there any allegation of "deliberate falsification" by Harbour or Baliles. It does not detract in the least from the precedential authority of *Rodriguez* that two judges in that case were unwilling to commit themselves on a point irrelevant to the instant case.[6]

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[6]The reservation in the *Rodriguez* concurrence suffers from the same lack of focus on a particular constitutional violation that this Court found objectionable in *Baker* v. *McCollan*, 443 U.S. 137 (1979). Indeed, Judge Gee, one of the concurring judges in *Rodriguez*, wrote the opinion in *Baker* that this Court reversed.

Moreover, these concurring judges apparently were unaware of the cases, which might have resolved their uncertainty, holding that an erstwhile criminal defendant may not maintain a §1983 action upon an allegation that false information contributed to the maintenance of criminal proceedings against him when those proceedings have ended in acquittal or dismissal of the charges. In *Symkowski* v. *Miller*, 294 F. Supp. 1214 (E.D. Wis. 1969), the court found no §1983 action to lie where plaintiff alleged a deprivation of constitutional rights because three police officers testified falsely during trials against the plaintiff that resulted in acquittal. The court distinguished cases in which the prosecution, through the knowing use of perjured testimony, actually obtained a conviction—a situation which, the court thought, does give rise to a §1983 action. 294 F. Supp. at 1216-17. Implicit in the court's discussion and holding is the proposition that when a criminal prosecution ends in acquittal, the defendant has necessarily received due process regardless of whether erroneous and even knowingly false testimony was proffered against him.

In *Grisom* v. *Logan*, 334 F. Supp. 273, 276-77 (C.D. Cal. 1971), the court held that the alleged falsification of evidence at the §1983 plaintiff's preliminary hearing obviously did not deprive the plaintiff of any due process since the charges were dismissed. Once more, the court distinguished cases where perjured testimony is used to convict someone.

(Footnote continued on next page)

Petitioners apparently would have this Court reject the reasoning of the plurality in *Rodriguez* and the precedent underlying that opinion, and instead adopt the position of the *Rodriguez* dissenters. This Court has, of course, already declined one such invitation, since a petition for a writ of certiorari in *Rodriguez* was denied. 434 U.S. 1047 (1978). Moreover, the essential premise upon which the position of those dissenters was based is now clearly incorrect. The dissenters began with and repeatedly referred to the assumption that the Constitution guarantees citizens "the right not to be indicted and arrested for crimes of which they know nothing and of which they are altogether innocent." 556 F.2d at 1195, 1201, 1205, 1206. Being unable to cite precedent for their position, the dissenters instead relied on an appealing emotional argument: erroneous prosecutions *ought* not to occur. 556 F.2d at 1206.

But in *Baker* v. *McCollan*, 443 U.S. 137 (1979), this Court rejected the premise of the *Rodriguez* dissenters' argument:

> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. If it did, §1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released.

(Footnote 6 continued)

These decisions confirm the commonsense proposition upon which *Baker* v. *McCollan*, 443 U.S. at 145, in part rests: if these plaintiffs have a cause of action under §1983, so does *every* acquitted defendant and released suspect.

The *Symkowski* and *Grisom* cases also dispose of the hint, dropped by the petitioners but not pursued, that their cases involve assertion of some sort of right to "fundamental fairness" under the due process clause of the Fifth Amendment. (Petition at 25.) As these cases show, "fundamental fairness," to the extent that it exists as a separate constitutional guarantee, has been accorded where erroneous charges do not produce a conviction. *Cf. Brawer* v. *Horowitz*, 535 F.2d 830, 837 (3rd. Cir. 1976).

443 U.S. at 145 (footnote omitted). The Fourth Amendment protects only against deprivations of liberty accomplished "without due process of law." Where, as in *Baker*, *Rodriguez*, and here, this due process has been afforded, there has been no constitutional violation and there is no cause of action under §1983. The appropriate and sufficient avenue for redress of these quite real injuries "must be sought in state court under traditional tort-law principles." *Baker* v. *McCollan*, 433 U.S. at 146.

(c) The Previous Decision of this Court Concerning Impeachment of Affidavits Underlying Search Warrants, on Which Petitioners Rely, is Inapplicable to the Case at Bar.

Petitioners assert that this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), allowing impeachment of the veracity of affidavits underlying search warrants, enunciates a principle of constitutional law that undermines the decision below in the case at bar. Petitioners' reliance is misplaced. As has been previously pointed out at length in this brief, the Constitution provides two fundamentally different ways of making the probable cause finding that must underlie the initiation of formal criminal processes. One involves use of a field determination of probable cause or the issuance of a warrant by a magistrate. In these instances, the probable cause determination is subject to subsequent judicial scrutiny.

But proceedings before a grand jury are qualitatively and constitutionally different. The grand jury is itself the constitutionally recognized embodiment of due process, and no judicial reevaluation of the grand jury's findings is permitted. Instead, due process is protected through guarantees that the grand jury will be properly constituted and unbiased and that any indictment will meet certain criteria of facial validity. Respondents do not quarrel with the holding of *Franks*. But that holding is just as irrelevant to the issue before this Court as are the other decisions cited by petitioners that deal with the mechanisms that assure due process when some instrumentality other than a grand jury first finds probable cause.

Moreover, the holding in *Franks* is a function of the peculiar demands of the exclusionary rule and the necessity that searches be carefully scrutinized in order that evidentiary rulings

at trial may vindicate defendants' Fourth Amendment rights. 438 U.S. at 164-71. Essentially, *Franks* holds that a defendant must be able to challenge the veracity, as well as the sufficiency, of an affidavit underlying a search warrant if his trial on the merits is to comport with the requirements of the Constitution as expressed in the exclusionary rule. No such need exists in the instant case. Petitioners would have had ample opportunity to challenge the veracity of the perjured testimony had it actually been used against them at trial (which, of course, did not occur because the perjury was discovered before trial and petitioners' rights were vindicated through dismissal of the charges).[7]

(d) This Court Need Not Reach the Issues Involving the Alleged Liability of the County of Patrick for the Actions of the County Sheriff's Department, But Additional Grounds Support Dismissal of the Complaints as to the County.

Since petitioners' complaints were dismissed under F.R.C.P. 12 (b)(6) for lack of allegations of a basic constitutional violation, the courts below never discussed the issues arising out of the County of Patrick's alleged liability for a "pattern and custom" of "gross negligence" in training and supervising the members and employees of the County Sheriff's Department. This Court need not reach these issues, either, since the complaints were properly dismissed for the reasons stated by the courts below. If this Court should deem it appropriate, however, to explore these issues further, respondents respectfully urge that the case should be remanded for development of these issues by the courts below. But since petitioners have raised the issue of the County's liability here, respondents will briefly sketch the additional reasons why the County cannot be held liable.

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[7]It should also be noted that the process of constitutional double check established in *Franks* would be unworkable in the grand jury context. *Franks* calls for a judicial reweighing of the information—excluding arguably tainted information—that was available to the magistrate who first found probable cause. Since the proceedings of grand juries are secret and generally unrecorded, it would be impossible to perform a comparable reevaluation here.

(1) A Virginia County Has No Power or Duty to Supervise or Train Members of the County Sheriff's Department and Hence is Not Responsible for Any Alleged Failures of the Sheriff in This Regard.

Petitioners have alleged that the County has exhibited "gross negligence" and a "pattern and custom of direct misfeasance and/or malfeasance in failing to train, supervise and review and discipline members, agents and employees of the Sheriff's Department." They have also alleged that the Sheriff's acts are the acts and policy of the county for purposes of §1983. (Petition at 45-47.)

The Board of Supervisors of Patrick County, however, has no power or duty to supervise, train or discipline the Sheriff of Patrick County or his deputies. By statute and state constitution, the Sheriff and his department are wholly independent from the County. Local government officials other than the Sheriff have no interest or concern in the enforcement of the criminal laws enacted by the General Assembly and have no power to direct the Sheriff in the training and supervision of members of his department. The Board of Supervisors and Sheriff are separate and distinct constitutional offices. *See* Article VII §4 (Sheriff) and Article VII §5 (Board of Supervisors) of the Virginia Constitution (1971). The powers and duties of the Board are fixed by statute, and they have no powers other than those conferred by the General Assembly either expressly or by implication. *See* 5A MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA *Counties* §34 (1976 Repl. Vol.), and cases cited therein. Even the broadest construction of §15.1-510 *et seq.* of the Code of Virginia, which set forth the general powers of counties, will not support the petitioners' contentions that the County has the duty or power to train and supervise members of the Sheriff's Department. *Cf. Camp* v. *Birchett*, 143 Va. 686, 695, 126 S.E. 665, 129 S.E. 324 (1925) (city treasurer, as constitutional officer, is not subject to direction or control of city council).

The specific responsibility for training and supervision of law enforcement officials in Virginia belongs to the State, and not to the localities. Under Virginia Code §9-107.1 *et seq.*, the

Criminal Justice Services Commission, a component of the state government, is charged with the duty to establish and maintain police training programs throughout the Commonwealth and with the power to establish compulsory minimum training standards for all officers. Virginia Code §§9-109(2), 9-110. The Commission has no connection with individual localities, and it operates on a statewide basis. Any failure of Sheriff Harbour to train, supervise, review, or discipline members of his department may be attributable to the State, but not to the County of Patrick, since the County has no duty to provide such training. Therefore, the State rather than the County would be a proper party to these proceedings, and petitioners' complaints could properly have been dismissed on this alternative ground as to the County.

(2) The Complaints Fail to Allege a Sufficient Factual Basis to Establish That the Actions of the Individual Respondents Were Undertaken Pursuant to "Official Policy" of the County of Patrick.

Assuming for the purpose of argument that acts of the Sheriff are attributable to the County of Patrick, petitioners' allegations are insufficient to establish the existence of an "official policy" as that term has been defined in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), and its progeny. The complaints allege that at some unspecified prior time, unspecified officers of the Patrick County Sheriff's Department embarked on an

> ill-fated, scandalous drug investigation. In the aforesaid instance, said Department had entrusted important undercover duties to an untrained, irresponsible individual, the end result being that numerous criminal prosecutions were aborted because of the previous agent's conduct.

(Witt and Bowman Complaints, ¶5, Petition at 33.) This one prior episode is the sole basis upon which petitioners would have the Court find the existence of a "custom and usage" that is the "official policy" of the County regarding undercover officers.

Under the terms of §1983 as construed in *Monell*, a municipality can be charged with maintaining a *de facto* "official pol-

icy" through "custom and usage" that has acquired the force of law. But in discussing what constitutes such a custom and usage for purposes of §1983 liability, this Court in *Monell* cited with approval the opinion of Mr. Justice Harlan in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970):

> Congress included customs and usages [in §1983] because of the *persistent* and *widespread* discriminatory practices of state officials.... Although not authorized by written law, such practices of state officials could well be so *permanent* and *well settled* as to constitute a "custom or usage" with the force of law.

436 U.S. at 691 (emphasis added).

Cases such as *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied sub. nom. County of Nassau* v. *Owens*, 444 U.S. 980 (1979), and *Turpin* v. *Mailet*, 619 F.2d 196 (2d Cir.), *cert. denied sub. nom. Turpin* v. *City of West Haven*, 101 S.Ct. 577 (1980), on which petitioners rely, ignore this crucial definition. By holding that there need be no showing of a prior pattern of police misconduct, and that a single brutal incident may give rise to a cause of action against a municipality under §1983, the Second Circuit has rendered meaningless the "custom and usage" language of §1983. The Second Circuit has thereby read into the law liability that is not founded on statute, ordinance, regulation, custom or usage, and that is more closely akin to the *respondeat superior* liability that has been expressly rejected by this Court. The "single instance" standard enunciated by the Second Circuit in *Owens* has been rejected by other courts. *See, e.g., Popow* v. *City of Margate*, 476 F. Supp. 1237, 1246 (D.N.J. 1979). *Cf. Smith* v. *Ambrogio*, 456 F. Supp. 1130, 1134 n.3 (D. Conn. 1978).

Under the language of §1983 and this Court's decision in *Monell*, no "official policy" can have arisen as a result of one prior incident in which the Patrick County Sheriff's Department allegedly used an untrained individual in an undercover capacity. It is respectfully submitted that the allegations in the complaints against the County are essentially *respondeat superior* claims that are not cognizable in a §1983 action and that the complaints could properly have been dismissed on this alternative ground as to the County.

CONCLUSION

The courts below correctly decided the principal issue in this case, and their decision conflicts neither with the decisions of other circuits on this issue nor with principles enunciated by this Court. Alternative grounds also exist for dismissing the complaints as to the County. Respondents Harbour, Baliles, and the County of Patrick therefore urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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July, 1981